Supreme Court, U.S.
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No. 88-1870

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

In the Matter of ROBINTECH, INC.,

Debtor.

BOB BULLOCK, Comptroller of Public Accounts of the State of Texas,

Petitioner,

vs.

OPPENHEIM, APPEL, DIXON & CO.,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

The questions presented are the following:

I.

Did the Court of Appeals for the Fifth Circuit correctly apply the plain language of Bankruptcy Rule 2002(a)(8) by refusing to extend the bankruptcy claim bar date by three days under Bankruptcy Rule 9006(f) when notice of the bar date was sent by mail to creditors twenty days before the bar date as required by Bankruptcy Rule 2002(a)(8)?

II.

Does the question presented by the Petition for a Writ of Certiorari in the instant case rise to the level of importance warranting this Court's exercising its discretion to grant review?

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SUMMARY OF ARGUMENT

The court below correctly decided that the requirements of Bankruptcy Rule 2002(a)(8) were complied with in the instant case when the notice of the bankruptcy claim bar date (the "bar date") was placed in the mail a full twenty days before the bar date. The Fifth Circuit Court of Appeals properly rejected Petitioner's contention that Bankruptcy Rule 9006(f) should be viewed as extending the bar date by three additional days because Rule 9006(f) applies only when a time period runs from the date on which a notice is served, and not, as here, when the notice simply informs a party of the deadline by which that party must perform an act. Furthermore, even if the court below were incorrect in its holding, the issue presented by Petitioner does not merit review by this Court.

ARGUMENT

I.

The Decision of the Court of Appeals Below Was Correct.

A. The court below correctly relied on its interpretation of Federal Rule of Civil Procedure 6(e) in determining the inapplicability of Bankruptcy Rule 9006(f).

Bankruptcy Rule 2002(a)(8) provides that all creditors in a Chapter 11 bankruptcy proceeding shall receive not less than twenty days notice by mail of the time fixed for filing proofs of claims (the "bar date"). In Chapter 11 bankruptcy cases, such as the instant case, the actual bar date is set pursuant to court order under Bankruptcy Rule 3003(c)(3), not by Bankruptcy Rule 2002(a). The Advisory Committee on Bankruptcy Rules' Note to Bankruptcy Rule 2002(a) states that subdivision (a) of the rule is satisfied if the notices are deposited in the mail at least twenty days before the bar date because notice by mail is

complete upon mailing. Bankruptcy Rule 9006(f) provides, by contrast, that when there is a right or requirement to do some act within a prescribed period which begins to run from service of a notice, and the notice is served by mail, three days shall be added to the prescribed period.

As is demonstrated below, since the bar date in the instant case was set by court order and not by service of notice pursuant to Bankruptcy Rule 2002(a), Bankruptcy Rule 9006(f) had no application here.

The Advisory Committee on Bankruptcy Rules' Note to Bankruptcy Rule 9006(f) states that Rule 9006(f) "is the same as" Rule 6(e) of the Federal Rules of Civil Procedure. Advisory Committee Note to Bankruptcy Rule 9006(f). The court below naturally looked, therefore, to Federal Rule of Civil Procedure 6(e) to determine the proper application of Bankruptcy Rule 9006(f). In examining precedents interpreting Federal Rule of Civil Procedure 6(e), the Fifth Circuit correctly referred to its decision in *Carr v. Veterans Administration*, 522 F.2d 1355, 1357-58 (5th Cir. 1975). While the facts and issues in *Carr* were different from the facts and issues in the case at bar, the *Carr* court's interpretation of Rule 6(e) and its purpose is applicable to this case. In *Carr*, the Fifth Circuit observed that the probable purpose of Rule 6(e) is only to guarantee that parties served personally have no advantage over those served by mail when the choice of service by mail or in person is at the option of the party effecting service. Rule 6(e), *Carr* held, had no application when all parties must be served by mail. In the instant case, the Fifth Circuit similarly recognized that Rule 6(e) (and Bankruptcy Rule 9006(f)) would not apply because all parties were served by mail as required by Bankruptcy Rule 2002(a).

Moreover, *Carr* is merely one of a long line of cases from several circuit and lower federal courts which have consistently ruled that Federal Rule of Civil Procedure 6(e) extends a time

period only when a party served with notice by mail has a "prescribed period" to act and the time period begins to run from the date of service of such notice, but that Rule 6(e) will not extend a fixed deadline merely because notice of that deadline is served by mail. *Carr*, 522 F.2d at 1357. Thus, the court in *Carr* declined to invoke Rule 6(e) to extend the six-month period for filing a federal tort claim after a federal agency mailed a final notice of denial to a claimant. *See also, Mosel v. Hills Dep't Store, Inc.*, 789 F.2d 251 (3d Cir. 1986) (rule 6(e) does not extend ninety-day period from date of receipt of EEOC right-to-sue letter in which to file suit); *Clements v. Florida East Coast Ry. Co.*, 473 F.2d 668 (5th Cir. 1973) (rule 6(e) does not provide extension of obligation to pay costs "within 90 days"); *Flint v. Howard*, 464 F.2d 1084 (1st Cir. 1972) (same; ten-day period for filing motions under Federal Rule of Civil Procedure 52 or 59); *Goff v. Pfau*, 418 F.2d 649 (5th Cir. 1969), *cert. denied*, 398 U.S. 931 (1970) (same; time for filing petition for review of referee's order under former Bankruptcy Act); *United States ex rel. Tennessee Valley Auth. v. Easement & Right of Way*, 386 F.2d 769 (6th Cir. 1967), *cert. denied sub nom. Skaggs v. United States*, 390 U.S. 947 (1968) (same; statutory time for filing exceptions to commissioners' award).

The Court of Appeals below was also correct in seeking guidance from Federal Rule of Civil Procedure 6(e) in interpreting Bankruptcy Rule 9006(f). Rule 9006(f), like a number of Bankruptcy Rules, is explicitly modeled on a counterpart Federal Rule of Civil Procedure. It is only logical, therefore, for a court that construes such a Bankruptcy Rule to be guided by constructions of the equivalent Federal Rule of Civil Procedure. The Court of Appeals for the Fifth Circuit has used this method at least twice previously. *See In re Aguilar*, 861 F.2d 873, 874-75 & n.2 (5th Cir. 1988); *In re Seiscom Delta, Inc.*, 857 F.2d 279, 281 (5th Cir. 1988).

Petitioner objects to the Court of Appeals' reliance on precedent interpreting Federal Rule of Civil Procedure 6(e).

Petition, p.5. Petitioner fails, however, to justify this objection in light of the words of the Advisory Committee on Bankruptcy Rules' Note to Bankruptcy Rule 9006(f), which instructs that Rule 9006(f) "is the same as" Rule 6(e) of the Federal Rules of Civil Procedure. Moreover, Petitioner cites no cases that interpret Rule 6(e) in a manner contrary to the precedent relied upon by the Court of Appeals. Respondent has found no such case.

B. Under the plain language of Bankruptcy Rules 9006(f) and 2002(a)(8), the bar date herein should not be extended three days.

Petitioner incorrectly states in his Petition that he "had the *right to file a proof of claim within not less than 20 days after service by mail of the notice* of bar date." Petition, p.6 (emphasis in original). Petitioner also argues that the plain language of the Bankruptcy Rules should control. *Id.* at p.5. Petitioner, however, misinterprets the plain language of Bankruptcy Rule 2002(a)(8), which does not establish the bar date but only provides the mechanism for giving notice to creditors of the deadline for filing a proof of claim. The Rule states that "the clerk, or some other person as the court may direct, shall give the debtor, the trustee, all creditors and indenture trustees not less than 20 days notice by mail of . . . (8) the time fixed for filing proofs of claims pursuant to Rule 3003(c)." Bankruptcy Rule 2002(a)(8). As stated in the Advisory Committee on Bankruptcy Rules' Note to Rule 2002(a), "Since notice by mail is complete on mailing, the requirement of subdivision (a) is satisfied if the notices are deposited in the mail at least 20 days before the event." Advisory Committee on Bankruptcy Rules' Note to Bankruptcy Rule 2002(a). *See also* Bankruptcy Rule 9006(e)(service by mail is "complete on mailing").

Indeed, Bankruptcy Rule 2002(a) has nothing to do with setting the bar date in a Chapter 11 bankruptcy case. Bar dates in such cases, as in the instant case, are set pursuant to a separate order of the Bankruptcy Court pursuant to Bankruptcy

Rule 3003(c)(3). Bankruptcy Rule 2002(a)(8) requires only that notice of the bar date be placed in the mail twenty days before the bar date, which Petitioner admits was done in this case. It is clear, therefore, that the Bankruptcy Rules do not guarantee creditors a twenty-day period to file a claim, as Petitioner contends, but instead only provide that notice of the bar date will be placed in the mail twenty days before that date.

Petitioner also mistakenly asserts that Bankruptcy Rule 9006(f) extends the bar date by three days because the notice of the bar date is served by mail. That interpretation is incorrect because it purports to invoke the rule in circumstances to which the rule was not intended to apply. Rule 9006(f) provides the following:

> When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period.

Rule 9006(f) is inapplicable to the case at bar because Petitioner was required to perform an act to protect his rights (to wit: file a proof of claim) before a definite deadline, as distinguished from being required to perform an act "within a prescribed period" of time after service of the notice. The notice of bar date did not give Petitioner a "prescribed period" after service of a notice within which to do some act; it simply notified Petitioner that any claims filed after February 14, 1984 would be barred. Thus, construing the plain language of Bankruptcy Rules 2002(a)(8) and 9006(f), the Court of Appeals below properly held that the bar date in the instant case should not be extended three days merely because notice of the bar date was served by mail.

Significantly, with the sole exception of the Bankruptcy Court decision in the instant case, 69 Bankr. 663, all Bankruptcy Courts which have interpreted Bankruptcy Rule 9006(f) in the context of proof of claim bar dates have reached the same result

as did the Circuit Court below. *See In re Roberts*, Ch. 7 Case No. 87-00053 (Bankr. D. Vt. March 31, 1989) (LEXIS Bankr. 528) (reproduced in Appendix hereto) (rule 9006(f) does not extend Chapter 7 bar date); *In re Allegheny Int'l, Inc.*, 93 Bankr. 910, 912 (Bankr. W.D. Pa. 1988) (same; Bankruptcy Code chapter unstated); *In re Wellman*, 74 Bankr. 91, 93 (Bankr. D.S.C. 1985) (same; Chapter 11 bar date); *In re Whitten*, 49 Bankr. 220, 222 (Bankr. N.D. Ala. 1985) (same; Chapter 13 bar date). *See also Centrust Sav. Bank v. Duncan (In Re Duncan)*, 86 Bankr. 288 (Bankr. M.D Fla. 1988) (rule 9006(f) does not extend sixty-day period for filing complaint to determine dischargeability); *Highland Community Fed. Credit Union v. Williams (In re Williams)*, 75 Bankr. 887 (Bankr. D. Or. 1987) (same); *C.M. Wilburn v. First Citizens Bank & Trust Co. (In re Wilburn)*, 72 Bankr. 167 (Bankr. D.S.C. 1986) (rule 9006(f) does not extend filing date for complaint objecting to discharge).

Moreover, to accept Petitioner's interpretation would substantively change the meaning of Bankruptcy Rule 2002(a). Rule 2002(a) mandates that twenty days notice of eight enumerated deadlines be provided by mail to parties in interest, with no express provision for personal or other method of serving such notices. Thus, if Petitioner's proposed interpretation of Rule 2002(a) were to be accepted, this Court would be rewriting Rule 2002(a) to require twenty-three days, rather than twenty days, notice in each of the eight enumerated situations.

The above observation merely highlights the inapplicability of the three-day extension under Bankruptcy Rule 9006(f) to notice of a bankruptcy claim bar date. Bankruptcy Rule 3003(c)(3) governs extensions of proof of claim bar dates in Chapter 11 cases, not Rule 9006(f). This Court, by promulgating Bankruptcy Rules 2002(a)(8) and 9006(f) effective August 1, 1983 (*See* 28 U.S.C.A. § 2075 (West 1982):

Supreme Court Order Prescribing Rules, April 25, 1983, *reprinted*, 75 L.Ed.2d xliii (1983) *and* 11 U.S.C.A. Rules 1 to 7000, XIII (West 1984)), has approved twenty days notice of the bar date by mail as the minimum fair notice time period. Petitioner does not allege that twenty days notice by mail was unfair. He is simply asking this Court to amend Bankruptcy Rule 2002(a)(8) in order to allow Petitioner three additional days to which he is not entitled under the rules as they now stand.

II.

The Question Presented by Petitioner Does Not Merit Supreme Court Review.

Even if the Court of Appeals for the Fifth Circuit were incorrect in holding that Bankruptcy Rule 9006(f) does not apply in this case, the issue presented in the Petition for a Writ of Certiorari is not worthy of this Court's review. Rule 17 of the Rules of the Supreme Court of the United States indicates that a writ of certiorari will be granted only when "there are special and important reasons therefor" and lists examples of the character of reasons that will be considered. The question upon which Petitioner seeks review simply does not fall within any of those examples or otherwise merit the attention of this Court.

Petitioner asserts that review of the opinion below is necessary to resolve an important problem as to the interpretation of the Bankruptcy Rules. Yet Petitioner fails to cite any other appellate cases dealing with the issue he presents to the Court, and Respondent has found none. It is respectfully submitted that if the question presented by Petitioner were as important as Petitioner suggests, then other litigants would have raised it on appeal at some time since Bankruptcy Rules 2002(a) and 9006(f) became effective in 1983.

Moreover, the decision of the Fifth Circuit below is not in conflict with any other reported decisions from any court other than that of the Bankruptcy Court in this very case. *See* 69

Bankr. 663 (Bankr. N.D. Tex. 1987). The interrelationship between Bankruptcy Rules 9006(f) and 2002(a)(8) is not "unresolved," as implied by Petitioner. Petition, pp. ii, 5. Numerous Court of Appeals decisions, cited at pages 3 and 4 above, have consistently interpreted Federal Rule of Civil Procedure 6(e). Since, as established above, Bankruptcy Rule 9006(f) is "the same as" Federal Rule of Civil Procedure 6(e), these decisions, by extension, uniformly and correctly construe Bankruptcy Rule 9006(f). Moreover, the Bankruptcy Court decisions, cited at pages 7 and 8 above, have explicitly and consistently ruled contrary to Petitioner's interpretation of Bankruptcy Rule 9006(f).

The decisions of the Bankruptcy Court and District Court below were anomalous departures from the well-settled judicial interpretation of Federal Rule of Civil Procedure 6(e) and its Bankruptcy Rule counterpart. The Court of Appeals below properly performed its appellate function by deciding this case according to the universally accepted construction of Rule 6(e) based upon the plain meaning of that rule.

Any issue that is dispositive of a case, of course, will be "important" to the parties involved. But this does not render every such question "special and important" within the meaning of Supreme Court Rule 17. *See Rice v. Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955); *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923). Petitioner seeks to invoke the discretionary review power embodied in a writ of certiorari to obtain his fourth hearing upon a technical issue of bankruptcy procedure that has been of interest to very few litigants (as evidenced by the dearth of reported decisions) and apparently to no appellants other than Petitioner. He seeks this extraordinary remedy not really to seek clarification of any "unresolved" question of law, but merely in an attempt to convince this Court to change a clear, fair, and well-settled Bankruptcy Rule so that Petitioner will have more time to file his proofs of claims in bankruptcy cases. For the reasons stated above, the Court should reject this attempt.

CONCLUSION

The question of whether Bankruptcy Rule 9006(f) should be invoked to extend the bar date in this case by three days was adequately reviewed and correctly decided by the Court of Appeals for the Fifth Circuit. The Fifth Circuit's decision that Bankruptcy Rule 9006(f) does not apply to the instant facts is the correct interpretation of that rule and achieves a fair result to all parties in interest. Moreover, the question presented by Petitioner is not sufficiently significant to warrant review by this Court.

Wherefore, a writ of certiorari should not issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit in this case.

Respectfully submitted,

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APPENDIX

In re Roberts, Ch. 7 Case No. 87-00053 (Bankr. D.Vt. March 31, 1989) (LEXIS Bankr. 528) (Text reprinted verbatim from LEXIS printout except lengthy quotations are indented for clarity.).

IN RE: EDWARD ROBERTS,
d/b/a/ ROBERTS CONSTRUCTION, Debtor

Case No. 87-00053 Chapter 7

UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF VERMONT

1989 Bankr. LEXIS 528

March 31, 1989, Decided and Filed

[*1]

Francis G. Conrad, U.S. Bankruptcy Judge

COUNSEL:

Raymond J. Obuchowski, Esq., Mayer, Berk & Obuchowski, South Royalton, Vermont, Trustee, pro se.

Fred I. Parker, Esq., Langrock, Sperry, Parker & Wool, Burlington, Vermont, for creditor Gordon N. Owen, d/b/a G.N. Owen & Sons (Owen).

OPINION BY: CONRAD

OPINION:

MEMORANDUM DECISION n1 ON DISALLOWANCE OF CLAIM

n1 We have jurisdiction to hear this matter under 28 USC § 1334(b) and the general reference to this Court. This is a core matter under 28 USC § 157(b)(2)(B). This Opinion constitutes findings of fact and conclusions of law under F.R. Civ.P. 52 as made applicable by Rules of Practice and Procedure in Bankruptcy Rule 7052.

FRANCIS G. CONRAD, UNITED STATES BANKRUPTCY JUDGE

Owen moves the Court, under Rules of Practice and Procedure in Bankruptcy Rule 3008, to reconsider the disallowance of its claim and the allowance of the trustee's final

accounting. Owen argues that because the Bankruptcy Clerk's Office notified it by mail of the ninety (90) day period within which to file a proof of claim under Bankruptcy Rule 3002(c)(5), by virtue of Rule 9006(f), Owen had an additional three (3) days within which to file its claim. The trustee disagrees.

The [*2] facts are straightforward and are not disputed. Debtor filed its voluntary Chapter 7 petition on March 17, 1987. According to the debtor's filed schedules, there was no estate from which any dividend could be paid to creditors. On March 24, 1987, the Court issued a Notice Order setting the first meeting of creditors and indicating that it was unnecessary to file claims at that time. Assets were eventually realized and, on August 4, 1987, the Bankruptcy Clerk mailed a "Notice to Creditors and Other Parties in Interest of the Need to File Claims." The Clerk's notice advised creditors they must file their proofs of claims in this case on or before November 2, 1987.

Owen dated and mailed its proof of claim to the Bankruptcy Clerk on October 30, 1987. The proof of claim was received and file stamped by the Bankruptcy Clerk's Office on November 5, 1987, three days beyond the bar date. Owen received notice of the filing of the trustee's report and final account, and notice of a hearing for approval of same between November 17, 1988 and November 29, 1988. n2 Included in the final account was the trustee's disallowance of Owen's claim against Debtor in the amount of $4,479.26 as not being [*3] timely filed. The trustee's report and final account were heard and approved by the Court on December 19, 1988. Neither Owen, nor counsel for Owen, appeared at the hearing. On December 27, 1989, Owen filed its "Motion to Reconsider Disallowance of Claim and Allowance of Final Account." After a February 6, 1989 hearing on the motion to reconsider, we reserved decision.

n2 See, Owen's "Motion to Reconsider Disallowance of Claim and Allowance of Final Account," pg. 1.

The Rules of Practice and Procedure in Bankruptcy provide us with the initial framework for an analysis of this dispute. Bankruptcy Rule 3002(c) n3 governs the time within which proofs of claims must be filed in Chapter 7, Chapter 12, n4 and Chapter 13 cases. The case law in this Circuit consistently regards the prescribed time period allowed for the filing of proofs of claims set forth in Rule 3002(c) as a statute of limitations barring late filing. n5 In re Nohle, 93 BR 13, 15 (Bkrtcy.N.D.N.Y. 1988) (citing cases). Accord, Associated Container Transportation [Australia] Ltd. (In re Black & Geddes, Inc.), 58 BR 547, 552-553 (S.D.N.Y. 1984). "This . . . filing requirement is a mandatory nondiscretionary [*4] statute of limitations, and may not, therefore, be extended by the courts once it has expired." Lazar v. Sullivan (In re Sullivan), 36 BR 771, 772 (Bkrtcy.E.D.N.Y. 1984). See, In re Alstead Automotive Warehouse, Inc., 16 BR 924 (Bkrtcy.E.D.N.Y. 1982).

n3 Rules of Practice and Procedure in Bankruptcy Rule 3002(c) provides:

(c) Time for Filing. In a chapter 7 liquidation or chapter 13 individual's debt adjustment case, a proof of claim shall be filed within 90 days after the first date set for the meeting of creditors called pursuant to § 341(a) of the Code, except as follows:

> (1) On motion of the United States, a state, or subdivision thereof before the expiration of such period and for cause shown, the court may extend the time for filing of a claim by the United States, a state, or subdivision thereof.
>
> (2) In the interest of justice and if it will not unduly delay the administration of the case, the court may extend the time for filing a proof of claim by an infant or incompetent person or the representative of either.

(3) An unsecured claim which arises in favor of a person or becomes allowable as a result of a judgment may be filed within 30 days after the judgment becomes final if the judgment is for the recovery of money or property from that person or denies or avoids the person's interest in property. If the judgment imposes a liability which is not satisfied, or a duty which is not performed within such period or such further time as the court may permit, the claim shall not be allowed.

(4) A claim arising from the rejection of an executory contract of the debtor may be filed within the time as the court may direct.

(5) If notice of insufficient assets to pay a dividend was given to creditors pursuant to Rule 2002(e), and subsequently the trustee notifies the court that payment of a dividend appears possible, the clerk shall notify the creditors of that fact and that they may file proofs of claim within 90 days after the mailing of the notice.

(6) In a chapter 7 liquidation case, if a surplus remains after all claims allowed have been paid in full, the court may grant an extension of time for the filing of claims against the surplus not filed within the time hereinabove prescribed. [*5]

n4 Chapter 12 cases are governed by Rule 3002(c) as well, although the rule does not so specify. See, In re Wharry, 91 BR 31 (Bkrtcy.N.D.Ohio 1988); In re King, 90 BR 155 (Bkrtcy.E.D.N.C. 1988). See also, VLBR 3002.

n5 We make a clear distinction between the Rule 3002(c) provisions for the time within which one must file a proof of claim in a Chapter 7, 12, or 13 case and Rule 3003(c)(3). Under Rule 3003(c)(3), the Court fixes the time within which proofs of claims may be filed in a Chapter 11 reorganization case. Additionally, Rule 3003(c)(3) provides that "for cause shown," the Court may extend the time within which proofs of

claims may be filed. The District Court for the District of Vermont, in reversing our denial of a Chapter 11 creditor's motion to enlarge time for filing of a proof of claim under Rule 3003(c)(3), commented on the statute of limitations analogy:

> "Although courts have ascribed statute of limitations characteristics to the claims bar, the claims bar departs from a statute of limitations in one essential fashion. Unlike the finality of a statute of limitations, the claims bar is subject to statutory and equitable extension. . . . Rule 3003(c)(3) orders lack the finality contemplated by Bankruptcy Rule 9024 and F.R.Civ.P. 60(b)." In re STN Enterprises, Inc. Slip Op., dated July 28, 1988, Billings, D.J. (now Chief Judge).

The instant issue, however, is a late-filed Chapter 7 proof of claim upon which Rule 3003(c)(3) has no application. Unlike Rule 3003(c)(3), Rule 3002(c) creates a statute of limitations barring statutory or equitable extension. Rule 3002(c) subsections (1) though [sic] (6) provide specific exceptions to the 90 day time frame within which to file proofs of claim, but which are in themselves strictly controlled and limited by Rule 3002. See, Rules of Practice and Procedure in Bankruptcy Rule 9006(b)(3). [*6]

In In re Valley Fair Corp., 4 BR 564 (Bkrtcy.S.D.N.Y. 1980), a Chapter XI Act case involving a dispute whether the period of time Ordered by the Court for the filing of a claim by the creditor constitutes a statute of limitations, Judge Babitt held:

> It is no longer a litigable issue, and needs no citation of abundant authority, that the period fixed by statute for the filing of claims against the assets of an estate is a statute of limitations, mandatory and inexorable, peremptory and unyielding even to the exercise of some equitable power. . . . Internal proof that no deviation was contemplated [by Congress] is found in . . .[former] Rule 906(b) . . . .

Id., at 566-67. (parentheticals supplied for clarity). These Courts have found that the rule is to be strictly construed "because the purpose of a claims bar date is to provide the debtor and its creditors with finality and to insure the swift distribution of the bankruptcy estate." In re Nohle, supra, at 15, citing, In re Johnson, 84 BR 492, 494 (Bkrtcy.N.D.Ohio 1988) and In re Good News Publishers, Inc., 33 BR 125, 126 (M.D.Tenn. 1983). We agree. Furthermore, implicit in Rule 3002(c) is the restriction [*7] that the ninety (90) day time period for filing proofs of claims cannot be enlarged unless one of six exceptions are germane. The terms of Rule 3002(c) permit an enlargement of the time within which to file a proof of claim only in the presence of certain very narrowly constructed situations such as for the filing of a claim by an infant or incompetent person, or in the event there remains a surplus after all other allowed claims have been satisfied.

Rules of Practice and Procedure in Bankruptcy Rule 9006(b) governs the Bankruptcy Court's authority to enlarge time. We are empowered by virtue of Rule 9006(b), upon a showing of excusable neglect, to extend the time constraints for undertaking a required act. The express language of that subsection, however, states that such a showing may not be made to extend the time period prescribed in Rule 3002(c) for the filing of Chapter 7, 12, or 13 claims. See, Rules of Practice and Procedure in Bankruptcy Rule 9006(b)(3). See also, In re Popular Fruit & Produce, Inc., 21 BR 185 (Bkrtcy.S.D.N.Y. 1982).

We note that inherent in the strict time requirements of the Bankruptcy Rules is the assumption that a creditor has received notice. If [*8] notice is given as required by Bankruptcy Rule 2002, save circumstances which fall under the enlargement provisos of Rule 3002(c), the time prescribed for the filing of a Rule 3002 proof of claim is quite simply an absolute bar date.

Notice, or rather, lack thereof, is not an issue here. Owen received notice of a no-assets bankruptcy filing which subsequently realized assets. Owen's proof of claim is one which we

categorize as a Rule 3002(c)(5) proof of claim. Subsection (5) is technically an exception to the claims bar date mandated by 3002(c). The enlargement afforded by Rule 3002(c)(5), however, is, in this Court's eyes, separate and unique from the other five subsections [of Rule 3002(c)]. Whereas the other five subsections may truly modify the 90 day time limit to a time frame unspecified, subsection (5) provides the original 90 day time frame directed by subsection (c). The distinction made in subsection (5) is only an adjustment of when the 90 days begin to run.

Subsection (5) cannot realistically be termed an enlargement provision. The original 90 day time frame is not enlarged because it never originally existed. In a noticed no-assets case, either a creditor's common [*9] sense or the Clerk of the Bankruptcy Court, or both, stall the necessity of filing a claim. Hence, the 90 day period commencing from the date of the § 341(a) meeting, prescribed in Rule 3002(c), never begins to run — at least not in a practical sense. When assets are realized, a new 90 day period is created under subsection (5).

Accordingly, while we recognize an absolute bar date is created under Rule 3002(c), save certain explicit circumstances permitting enlargement under Rule 3002(c)'s subsections, we also hold that a Rule 3002(c)(5) proof of claim, by its nature and because of its nature, does not qualify for departure from the absolute bar date.

The heart and soul of this contested matter rests then in our understanding of Rule 9006(f), and whether we perceive it as applicable to an absolute bar date.

Owen suggests that Bankruptcy Rule 9006(f) n6 affords it an additional three days within which to file its claim. Owen's claim was received and file stamped by the Bankruptcy Clerk three days beyond the bar date, and therefore, according to Owen, by the power of Rule 9006(f)'s three day extension

provision, the claim is not untimely filed. Owen does not provide us with case law [*10] which might support its argument. Owen instead reminds us "the basic premise for allowance of a reconsideration request is that reconsideration should be granted 'according to the equities of the case.'" "Bankruptcy Code § 502(j)." (Owen's "Memorandum in Support of Motion to Reconsider," pg. 1). We, of course, agree and have indeed granted its request for reconsideration. But Owen continues further — buttressing with a plea to our equitable nature which states: ". . . the disallowance Of [sic] the Owen claim could only have resulted from a misreading or misapplication of the law. . . . [T]he disallowance was improper and amounts to a substantial inequity on this Creditor. There is no reason why Owen ought to be treated differently than the other general unsecured creditors whose claims have been allowed." (Owen's "Memorandum in Support of Motion to Reconsider," pp. 1-2).

n6 Rules of Practice and Procedure in Bankruptcy Rule 9006(f) provides:

(f) Additional Time after Service by Mail. When there is a right or requirement to do some act or undertake some proceedings within a prescribed period after service of a notice or other paper and the notice or paper other than process is served by mail, three days shall be added to the prescribed period. [*11]

Pondering for a moment this appeal to our equity, n7 we are disturbed by Owen's inference that, through a judicial interest towards evenhanded treatment to creditors, (and which equitable treatment should encompass, according to Owen, those holding disallowed claims as well), we may betray an absolute bar date which gives us no discretionary power to enlarge the time for filing a Rule 3002(c) proof of claim. In re Nohle, supra; In re Kragness, 82 BR 553, 556 (Bkrtcy.D.Or. 1988). See, In re Owens, 67 BR 418, 423 (Bkrtcy.E.D.Pa

1986); In re Whitten, 49 BR 220, 222-23, 13 BCD 42 (Bkrtcy.N.D.Ala. 1985); In re Ryan, 54 BR 105, 106 (Bkrtcy.E.D.Pa. 1985); In re Markey, 33 BR 332, 333-34 (Bkrtcy.N.D.Ohio 1983).

n7 We make clear that Owen does not formally move to enlarge, or to extend, the bar date, and rightly so — such a motion, here, would clearly fail under Rules 9006(b) and 3002(c). We are not quite sure what it is that Owen asks of us on this point. We believe it has made some leap from reconsideration based on equities to allowance based on equities. Accordingly, for sake of completeness, we discuss briefly the policy this Court employs regarding equitable enlargement. [*12]

As we have already said, Rule 9006(b) explicitly excludes Rule 3002 proofs of claims from enlargement except as expressly provided in Rule 3002 itself. The Nohle Court, quoting In re King, 90 BR 155 (Bkrtcy.E.D.N.C. 1988), said:

> The clear Congressional intent to require filing of valid proofs of claims within the established time limits precludes any exceptions based on general equitable principles. While the effects of the bar date appear harsh, any other result would undermine the clear purpose of the Bankruptcy Rules. In re King, supra, at 158 (citing Maressa v. A.H. Robins Co., Inc., 839 F.2d 220, 221 (4th Cir. 1988)).

In re Nohle, supra, 93 BR at 16 (Bkrtcy.N.D.N.Y. 1988).

Perhaps the most glowing application of such policy is found in the Third Circuit. In In re Pigott, 684 F.2d 239 (3d Cir. 1982), even in the face of very compelling circumstances, the purported justification being the disruption of the claimant's business by the nuclear accident at Three-Mile Island, and that, even if so inclined, "a bankruptcy court has no . . . equitable power to extend the deadline for filing proofs of claim." In re Ryan, supra, 54 BR at 106 (Bkrtcy.E.D.Pa. [*13] 1986), quoting In re Pigott, at 242. In reversing the District Court's

Order affirming the Bankruptcy Court's decision. District Judge Ackerman, sitting by designation, held: "Even where the equities have weighed strongly in favor of extending the time period . . . the bankruptcy court did not have the equitable power to extend the filing date . . . even a few days." In re Pigott, supra, at 243.

In summary, we are bound by the circular control of the Bankruptcy Rules. We are without discretionary power here and accordingly, we cannot lend consideration to the equities of the matter. Owen's allusions on this point must be wholly rejected.

We turn back now to the actual issue. Owen contends that because the August 4, 1987 "Notice to Creditors and Other Parties in Interest of the Need to File Claims" was mailed to Owen, such notice then invites the supervision of Rule 9006(f). This is a very popular argument. Unfortunately for Owen, it rarely prevails. See, In re Alleghany [sic] Intern, Inc., 93 BR 910 (Bkrtcy.W.D.Pa. 1988) (Bankruptcy Rule providing for additional 3 days does not extend bar date for filing of proof of claim); Centrust Savings Bank v. Duncan (In re Duncan), [*14] 86 BR 288 (Bkrtcy.M.D.Fla. 1988) (Rule 9006(f) does not apply to give creditor additional 3 days after expiration of 60 day period to file complaint to determine dischargeability); Highland Community Federal Credit Union v. Williams (In re Williams), 75 BR 887 (Bkrtcy.D.Or. 1987) (same); C. M. Wilburn v. First Citizens Bank & Trust Company (In re Wilburn), 72 BR 167 (Bkrtcy.D.S.C. 1986) (Rule 9006(f) not effective in extending filing date set by Rule 4004(a) governing discharge of Chapter 7 case); In re Wellman, 74 BR 91, 13 BCD 42 (Bkrtcy.D.S.C. 1985) (Rule 9006(f) three day provision can not apply to proof of claim received by clerk of court on 91st day); In re Whitten, 49 BR 220 (Bkrtcy.N.D.Ala. 1985) (Proof of claim due date not extended on account of notice being given by mail).

In In re Robintech, Inc., 69 BR 663 (Bkrtcy.N.D.Tex. 1987), where the trustee objected to a proof of claim filed two days beyond the bar date, the Bankruptcy Court held that the claim would nevertheless be allowed applying the additional three days provided by Rule 9006(f). In so holding the Court specifically rejected any distinction between "a deadline on or before which they were [*15] to file claims" and a "requisite number of days within which to file a claim." Id., at 666. The ruling was appealed to the District Court and upheld. In the Matter of Robintech, Inc., 863 F.2d 393 (5th Cir. 1989), the Circuit Court of Appeals reversed, holding: "the rule (Rule 9006(f) [sic] . . . applies only when the 'prescribed period' is fixed by the date on which the notice is served." Id., at 395. (parentheticals added for clarity) (footnote omitted). The Circuit Court explained that the three day extension provided by Rule 9006(f) functions only to compensate for any possible disparity in the U.S. Postal Service's delivery of the mailed notice and the personal delivery of such notice. The Court stated further that "where, as here, all notices must be by mail, there is no need for such compensation, as all parties are theoretically subject to the same delays." Id.

In a similar ruling directed to a plaintiff-appellant's contention that the 90 day period statutorily mandated for the filing of a suit was extended by F.R.Civ.P. 6(e), n8 the Court of Appeals for the Third Circuit held:

> "[F.R.Civ.P. 6(e)] applies only where a time period is measured from the date of service [*16] by mail, and allows a party so served additional time to respond, in order to account for the time required for delivery of the mail." Mosel v. Hill [sic] Department Store, Inc., 789 F.2d 251, 252 (3d Cir. 1986). (parentheticals added for clarity). The Mosel Court of Appeals held that the three day extension was inapplicable to a statutory requirement to commence a lawsuit within a specified period of time.

n8 The Advisory Committee Note to Rule 9006(f) states that "[s]ubdivision (f) is new and is the same as F.R.Civ.P. 6(e)."

Mosel is analogous to the instant case. Where service of a notice does not trigger the running of a prescribed period of time, but rather, merely establishs [sic] a deadline for the filing of proofs of claims, and accordingly the time period is not measured from the actual date of service by mail. Rule 9006(f) can have no application.

An appropriate Order will be entered.

DATED at Rutland, Vermont this 31st day of March, 1989.